LAND TRANSFER. — A DIFFERENT POINT OF VIEW.

In dirty upper casements here and there hazy little patches of candle-light reveal where some wise draughtsman and conveyancer yet toils for the entanglement of real estate in meshes of sheepskin, in the average ratio of about a dozen sheep to an acre of land. Over which bee-like industry these benefactors of their species linger yet, though office hours be past, that they may give for every day some good account at last. — *Bleak House.*

IN entering upon a discussion of the Torrens System, so called I am conscious that I am at a great disadvantge. I have not been able to give the subject the time and thought which I would gladly have given. I am also sensible of a bias in favor of the old order of things in which I have grown up, which might well disqualify me. But I have been asked what I think of the proposed change, and I feel under a certain compulsion to answer. What I am disposed to think of it at the present moment is that, if adopted, a real gain, but not nearly so large as anticipated, will be made for real-estate owners of the future, at the cost of much intervening trouble and expense, with many drawbacks, including a great establishment permanently saddled on the public treasury, and a rigid system of officialism and red tape in absolute control of private transactions in land.

Whether the change would be worth while on the whole, I am not sure; I incline to think certain features of it should be adopted, at least experimentally.

The proposed system, as I understand it, involves two entirely separable principles. One is that of inexpugnability of title, the State not merely as insurer promising indemnity against failure of title, but giving at each transfer a title which cannot fail, because it is made part of the framework of society that it shall not. The other is that of improvement in conveyancing and registration.

Let us take the matter of governmental title first. It is hardly necessary to say that the idea is very attractive. Some of us have held under the present order of things warranty deeds from the Commonwealth; but there the title might fail, and we might be obliged to sue for compensation, — humbly to the Legislature, or not

humbly in the courts, if the law then in force should allow the State to be sued.

But the promise here is of a title absolute, — until the State, which gave it, takes it away, as it may prove very ready to do when it has got its hand in, and the people are thoroughly educated in the doctrine that the State in the great perpetual fountain of title from which each draws his draft, till he gives his place to another, who draws in turn.

Such a system would require, I suppose, a constitutional amendment; and whether real-estate owners care to enter upon the path of constitutional changes as to land, I do not know: it might have dangers.

Perhaps I have misunderstood the idea, and the real intent may be to get title into the Commonwealth, and then have it convey with warranty. This might be accomplished by allowing the individual landholder to transfer his title to the State, providing for the quieting of that title against all the world by some process of notice and judicial or quasi-judicial sifting, or by the exercise of an enlarged power of eminent domain, taking an entire territory and then granting it out. Perhaps either of these methods might be worked under the existing constitution. I do not feel sure that the present power of eminent domain may not extend to this. If Tom-all-alones involved in the meshes of Jaundyce *v.* Jaundyce can be taken as a nuisance after it has fallen into decay, why not when the titles there are in a condition such as must eventually make it a nuisance? If the taking is really for the good of society, is not this enough? It is clear that the title of one cannot be taken to give to another to end litigation (Lewis on Eminent Domain, sec. 205). Whether the supposed case could be distinguished and upheld, query? But even if all titles could be got into the State without a constitutional amendment, it would still seem impossible to get along without one, as it would be impracticable to have a quasi suit or taking with each future transfer.

But perhaps again I have misunderstood what is proposed, and it is merely governmental insurance of title, *i. e.*, of indemnity for failure of title, which is proposed. I see no constitutional difficulty in legislation which should authorize the insurance by the government of all titles which might come up to an official standard; it is merely substituting public for private insurance. But the advantages of such a plan over private insurance would not be, it seems to me, sufficient to justify it, and there would be

no balm in such a Gilead for clouded titles which fall below such standard.

But whatever system of securing the title is adopted, the having individual titles here and there brought under the Act after what amounts to a lawsuit in each case, and the maintenance side by side of the old system and the new, would, it seems to me, be a very bad arrangement. No title which had a blemish could be brought under the Act. Every title not brought under the Act would be under a species of cloud. Persons who supposed they had a good title would try to come under the Act, and would rouse some sleeping dog and fail.

If we are to change to a system of governmental title, let it be one which brings under the Act an entire city or district or block, upon the initiative of its owners, or some proportion of them.

But do we need governmental title in any form? If we are to judge of the proposed remedy, we must know the disease.

The uncertainty of titles to-day is the disease. How bad is it? Muster all the bugbears, — forgery and fraud, conveyancers' mistakes, intrinsic complications from doubtful law or facts, as a complicated will, or a child never heard from, — how many titles are unmarketable? How much loss has there been from bad titles? How much litigation is there over titles? No answer can be given to these questions which will not affirm the essential soundness and practical safety of the present system.

If the disease is so mild, may we not conclude that any very expensive remedy is not expedient?

It would obviate much of the difficulty in bringing titles under the Act, if all present titles should be registered as possessory, and the Act be made to apply to all future transfers. But if the certificate must be conclusive as to changes in the title from the passage of the Act to date of the certificate, a constitutional amendment would still seem necessary.

As I have said, the feature of conclusiveness of title is separable and may be dropped, leaving us with a new system of indexing and registration merely; but the subject has not been presented from that point of view, and I shall not attempt to consider it in that aspect.

Proceeding, then, to a further consideration of the subject on the supposition that the certificate is to have some degree of conclusiveness, I ask again, What is the disease to be remedied? Uncertainty, delay, unwieldiness and perishability of records, expense, — these, perhaps, are the chief categories.

As to uncertainty, of course just so far as it exists it is an evil. The remedies against forgery and personation proposed in the new methods seem to me to adapt themselves as readily to the present methods as to the new. If we are willing to go to the trouble of only executing our deeds before some few magistrates and with a cloud of witnesses, and then leaving those deeds permanently on file I do not see but that we have done about all that is proposed in that direction. The surrender of the old certificate would, I admit, be an additional safeguard; but a copy of the title-deed, which should be certified as given for the purpose of identification, and which must be returned or exhibited with each transaction would seem fully equivalent.

A workable machinery for quieting titles such as will eventuate in a decree binding all the world (as is now possible, since the recent decisions of the Supreme Court, Arndt *v.* Griggs, 134 U. S. 316) would go far to give the desired certainty to title, and an effort is now being made to obtain it from the present Legislature.

As regards delay, paradoxical as it may seem, I believe that in many cases the present system is quicker than the new would be. In many cases no examination of title is desired. Here the deed can be drawn, delivered, and recorded in an hour; you are free to pass title where you please, and the deed is merely carried to the registry and recorded. Under the proposed system, if I understand it, you must draw your deeds, or some sort of writing evidencing the transaction; then you must carry such writing and your duplicate of the certificate or abstract to the register; you must wait your turn, cap in hand; you must have that certificate thoroughly overhauled, whether the purchaser desires it or not; inquiries must be made as to all matters not necessarily apparent on the certificate, which I suppose must include taxes, public assessments, insolvency, encroachments (involving a fresh survey), marriage, and all other facts *in pais*. It seems to me clear that you would not, in such a case, handle your money as quickly in the new order of things as in the old. There are many cases also in which, although an examination is required, the transaction can be accomplished almost as quickly as though no examination were demanded. In the ordinary course things are not so rushed through; there is other business ahead, and it takes time at best to get people together and arrange details. But let the necessity appear, — your client is going abroad, we will say, next day, — and it can be done. Under the new system, I don't see how it can be done.

But the ten days' to three weeks' delay incident to the ordinary full examination would be shortened, I do not doubt, and I do not desire to minimize that gain; and a survey, with all its delay, would be a very decided gain also, though it can always be had now if desired.

As to unwieldiness of records, I am not so much impressed by the rapidly growing mass of the volumes in our registries as I am by the marvel that the life history of each parcel of land in our city, from its origin, can be found in those few volumes.

But I do not see how the mass of records is to be lessened by the proposed change. One suburban farm, cut up into lots, would fill a volume, and the original papers are all to be preserved. Possibly an owner would not be allowed, however, a page a lot, till he actually sells.

As to perishability, it is of course some safeguard to have a duplicate certificate in the owner's hands; but my favorite scheme is to have the records heliotyped in small volumes (say 12mo.), and put away in duplicate in several safe places of deposit.

As regards expense, there would, I believe, be a large saving to the landowner, with a large permanent tax upon the public. The expense to-day, however, is not so burdensome as it sometimes seems. A large percentage of titles are not examined, and a still larger are examined for only a short period, and the land-speculator is almost the only person who has frequent occasion for the services of a conveyancer. One hardship now exists, and I shall rejoice to see it done away with, — the borrower having to pay for successive examinations every time he shifts his loan.

Our present law of limitations by its care for disability necessitates examinations going very far back, where the fullest security is desired. Its "twenty years," in extreme cases, may mean one hundred and twenty. I believe this is all wrong, and that there should be a short Statute of Limitations, without any exceptions for disability. Such a statute would tend greatly to shorten examinations and save expense.

I have always dreaded a shortening up of forms as involving ambiguities and a perplexing mixture of standard forms and special matter, but I have finally come to believe that such a change can be made, and is desirable.

I wish the whole subject of real estate law could be referred to a commission, with the honored author of "Notes on Common Forms" at its head.

Weak or questionable points in the system proposed seem to me to be -

1. The multiplication of instruments and of records. Each incumbrancer, down to the seven years' lessee, must have his page of the registry and his certificate; you have the deed as now, and also the entry. The entry is to be conclusive. Suppose the entry and the deed differ, and the entry is not as it should have been: Is it not as though now we were obliged by law to rely on the margin of the record as to whether a mortgage is discharged or not; and would that be safe? Would it be safe in all counties?

2. Caveats would seem to give unlimited opportunity for blackmail.

3. Suppose a man owns two hundred lots, — which is a moderate computation for a land-speculator, — an attachment is to be entered on every page of his two hundred pages, and so with every other like lien or general conveyance, as a marriage settlement or assignment for benefit of creditors; and this would necessitate keeping an index of names as well as lots.

4. As regards prescription, if the certificate is to be conclusive, of course it overrides this as well as everything else. But why should not prescription have its full effect in determining to whom a certificate should be issued, and give a claim against the State if it should be overlooked? The ripening of long possession into title plays such an important part in our law that, to give it up for a mere convenience of administration, seems of doubtful expediency.

5. As to trusts and equitable rights, are they also to be overridden by the new certificate? If not, what security has the certificate-holder? If the certificate does give a title free from trust, where is the security of the *cestui que trust*, or of the holder of an equitable easement? The record, it appears, is to show nothing of such matters. Is the State to be liable for wiping out such rights, when its officials have no means of determining what they are, or whether there are any?

6. As to devolution of title on decease, that is a distinct branch of law reform. I am inclined to think that considerable simplification can be accomplished in cases of intestacy; but are you going to simplify a complicated will?

7. What happens if a certificate is lost?

8. Is the public to have access to records?

9. On the record pages of what lots is a possible park betterment to be entered? All, I suppose, in the possible district; and so of a board of survey ukase.

10. On what pages in Suffolk, and when, is the issue of a warrant to a messenger in insolvency in Berkshire to be entered, or a bankruptcy in New York after we get a new bankrupt law?

11. How is a way of necessity ascertained and entered?

12. What happens when trustees are removed and new ones appointed by court? Or suppose receivers are appointed, is title not to vest? Suppose the old trustees have carried the certificate out of the State? Cannot the title be passed until they are forced to give it up?

13. What happens when land stands in name of A B "Trustee," or of A B "Trustee for C D," without more?

14. Suppose a foreclosure which is disputed, and the owner of equity and the purchaser at foreclosure sale each wants to sell?

15. Trustees of a land company dedicate a way, or release restrictions, thus giving rights to, we will say, one hundred persons, to whom lots have been previously sold: must all the hundred certificates be brought in?

16. A B makes a release under statute of uses to C D to the use of the parties legally claiming title under E F. What certificates are to be brought in? Would it not be impossible to make such a conveyance?

17. Suppose ten tenants in common, — shall each have a certificate and a page? Suppose a partition sale, and a recalcitrant part owner who has a certificate he will not give up?

The whim of King Log the conveyancer is no longer potent; but have we not a King Stork?

I have no doubt that the block system of indexing would be an improvement. I am inclined to believe that the carrying of the principle still farther to the lot system of the Torrens method would be even better in a city like Boston; but I cannot think it applicable to a country district. I admit that much of my doubt springs from ignorance, and I shall try to hold my mind open, like John Robinson in Holland, for more light.

In the mean time, without having any strong belief in the promised Utopia, I can yet sympathize with the desire for improvement, and take pride that my branch of the profession has men to discover and to champion methods of reform in advance of compulsory pressure from without.

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